

EMBASSY OF JAPAN
2514 MASSACHUSETTS AVENUE, N. W.
WASHINGTON 8, D. C.

ADAMS 4-2269

July 7, 1953

264
1953 JUL 11 1953

(R)

C.P. Setser

DEPARTMENT OF STATE A/CDC/MR	
REVIEWED BY <i>[Signature]</i>	DATE <u>9-30-83</u>
☐ OF XDC ☐ EXT. DATE 10 A.M.	☐ REASON(S) ☒ <i>[Handwritten]</i>

Mr. Vernon G. Setser
Commercial Policy Staff
Department of State
Washington 25, D. C.

Dear Mr. Setser:

This is to confirm in writing the questions raised by Mr. T. Kanematsu, Secretary of the Ministry of Foreign Affairs of the Japanese Government, who has recently been here to study relevant legislation of the United States and to ascertain the interpretation of the Department of State on certain provisions of the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America. The Embassy would be most grateful if the enclosed questionnaire could be answered in writing.

Sincerely yours,

Umeo Kagei
Umeo Kagei
Second Secretary

Enclosures

611.944/7-753
Central
Files

DC/R	31
Anal.	
Int.	
Ext.	

DEPARTMENT OF STATE
MESSAGE CENTER
1953 JUL 8 AM 9 53
Return to *[Handwritten]*
Replied 7-13
FILED
SEP 30 1953

193949

611.944/7-753
CSI

QUESTIONNAIRE

1. Re Second Sentence, para. 4, Protocol of the Treaty (Limitation with regard to certain types of enterprises)

As it is the State and Territory legislation alone that are enumerated in the sentence, the theoretical question comes up that Japan could not apply the principle of reciprocity in case such limitation with regard to the types of enterprises was placed by virtue of the Federal legislation on the part of the U. S. This question was practically settled, however, by placing on record an understanding in the course of negotiations that no such limitation has ever been placed by the Federal legislation nor would likely be in the future. We should like to know on this occasion if there are any limitations imposed by the Federal legislation upon such certain types of enterprises.

2. Re Second Sentence, para. 2, Article VII of the Treaty (Protection of vested rights)

Among other treaties of commerce and navigation the United States has at the present, "the provisions to protect the vested right" (this provision can be found only in the one with Colombia, para. 5 of the Protocol, U. S.-Colombia Treaty). Is it the interpretation of the Department of State that in the absence of such a protection clause it is not the violation of treaty obligation to place new limitations upon the vested right?

If not, what kind of corresponding provisions are set forth in the treaties with some of the other countries?

3. Re para. 3, Article XXI of the Treaty (GATT clause)

What kind of action has the Department of State in mind under "action by either Party which is required ... by GATT during such time as such Party is a contracting party to the General Agreement"?

Further, suppose such provisions were newly set forth in GATT as to prohibit all contracting parties to GATT from granting GATT concessions to any country not party thereto - how does the Department of State interpret the second sentence of para. 3, Article XXI of the Treaty (FNC) and the relation between such new provisions (hypothetical) and para. 2, Article XIV of the Treaty? In case the United States voted for such provisions as referred to above, does it not theoretically mean non-compliance by the United States with Article XIV para. 1 and Article XXI, para. 3, second sentence of the Japan-U. S. Treaty of FNC?

DC/R Central files

FW 611-1147-103

July 17 1953

In reply refer to
OP

Dear Mr. Kagai:

The receipt is acknowledged of your letter of July 7, enclosing a list of three questions with respect to which you request a statement of my views. There follow my replies to these questions, in the sequence in which you presented them.

1. With reference to the pertinence of Federal legislation to the matter treated in Protocol 4 (second sentence), it appears that in practice the only type of business corporation organized under Federal law is the national bank. Otherwise the chartering of business corporations in general is a function of the States and Territories.

As to federal limitations upon the business rights of other corporations, our information is that companies engaged in radio-broadcasting or in operating domestic airlines must be domestic corporations (i.e., not foreign) and owned to the extent of 75% of the voting stock by citizens. Under the Federal Power Act, licenses to build hydro-electric installations on navigable streams may not be issued to foreign corporations. With reference to the matter treated in the first sentence of Protocol 4, leases to exploit minerals on the federal public domain are not available to foreign corporations; and, in the case of certain named minerals (e.g., coal and petroleum), such leases are available to domestic corporations controlled by aliens only if the country concerned accords a reciprocal privilege to American citizens.

2. There

Mr. Umso Kagai,
Second Secretary,
Embassy of Japan,
2514 Massachusetts Avenue, N. W.,
Washington 8, D. C.

DC/R
Anal 36
Rev
Cat

CSF

2. There are three lines of precedent in recent treaties for the rule set forth in the second sentence of Article VII(2).

Insofar as banking is concerned, at least three of the treaties (those with Colombia, Denmark and Greece) guarantee the same clear protection to the "vested right" of banks as the cited provision of the treaty with Japan. You have mentioned the provision of the Colombia treaty which accomplishes this result (Protocol 5). The Colombia provision is also contained in the treaty with Greece (Article XIII, para. 2). The result is the same in the Danian case, though a different manner of achieving it was adopted. The basic business activities Articles of the Denmark treaty contain no exception for banking, such as found in the first sentence of Article VII(2) of the Japan treaty; and this fact, of course, obviates the need for a provision like the second sentence of the latter. The reservation about banking in that treaty (Protocol 6) concerns only the right of a Party to regulate the initial establishment of a bank, and does not affect the right of a bank which has been or may hereafter be established in the country to enjoy complete national treatment. Thus the "vested right" of banks is fully protected.

In the Ethiopia treaty, we have a case where all types of business enterprises, including banks, are fully accorded the protection contemplated in the Japan treaty. This treaty, insofar as business activities are concerned, in effect deals mainly with now or hereafter established "vested right", whether banks or otherwise. The requirement of national treatment for all established enterprises is set forth in the last sentence of Article VIII(5).

Thirdly, beginning with the Uruguay treaty of 1949 all our treaties generally have contained a provision like the opening clause of Article V, paragraph 1, of the Japan treaty, which forbids "unreasonable" or "discriminatory" measures impairing the "vested right". In principle, the general objective of this clause is similar to that of VII(2), second sentence, of the Japan treaty; and it definitely prevents certain types of new limitations upon the "vested right". However, it leaves room for interpretation as to whether "discriminatory" is to be applied in light of the "national treatment" concept or the "most-favored-nation" concept, as well as some uncertainty as to the full area of "vested right" covered. The Department, after study of the matter, has concluded that this ambiguity ought to be remedied by adding a precisely drafted provision like that represented by the second sentence of Article VII(2) of the Japan treaty, which

it is

it is hoped will be a model for future treaties.

3. The principal contingency visualized in the words "action by either Party which is required...by GATT, etc", Article XXI(3), would be a decision by the contracting parties to GATT that special tariff concessions negotiated under the GATT should be withheld from countries not party thereto. In my opinion, such a contingency is quite hypothetical.

You further inquire as to how this Department would interpret Article XIV and the second sentence of Article XXI(3) of the treaty in the event this contingency materialized. In answer, I may say that this Government does not now have GATT obligations, and could not in future undertake GATT obligations, that would place the United States in a posture of dishonoring its FCN treaty commitments. Any contrary supposition is entirely impermissible. Under the second sentence of Article XXI(3) of the treaty, the most-favored-nation treatment specified in Article XIV assures Japan the right to all concessions accorded by the U. S. to GATT members, so long as Japan is outside the GATT for reasons not of Japan's own choice and for so long as the treaty provisions remain in force between our two countries.

Sincerely yours,

Vernon G. Setser
Chief
Economic Treaties Branch
Commercial Policy Staff

S/S-CR
JUL 16 1953 PM

EDT:GP:HWalker:hc
7/9/53

L/E

W
GAT
NA

CONTROL
JUL 21 1953